UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

REGION 20

In the matter of: INTERNATIONAL UNION OF PAINTERS AND ALLIED TRADES, DISTRICT COUNCIL 16, Charging Party vs. DELTA SANDBLASTING COMPANY, INC., Respondent	Cases: 20-CA-176434 32-CA-180490

RESPONDENT DELTA SANDBLASTING COMPANY, INC'S BRIEF IN SUPPORT OF EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE MARA-LOUISE ANZALONE

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I. INTRODUCTION

Pursuant to the National Labor Relations Board's Rules and Regulations, including Section 102.46 thereof, Respondent Delta Sandblasting Company, Inc. ("Respondent," "Company" or "Delta"), submits this brief in support of its Exceptions to the Decision of Administrative Law Judge Mara-Louise Anzalone ("ALJ Anzalone") dated September 15, 2017.[1]

Delta seeks review of ALJ Anzalone's finding that the Company violated Sections 8(a)(1) and (5) of the Act by not bargaining with the International Union of Painters and Allied Trades, District Council 16 (the "Union") before discontinuing unlawful surcharge payments to the Pacific Coast Shipyards Pension Fund (the "Pension Fund"). To reach this finding, ALJ Anzalone relied on the mistaken premise that Board precedent required Delta to bargain with the Union over surcharge payments that violated Section 302(c)(5) of the Labor Management Relations Act ("LMRA").

As further explained below, ALJ Anzalone's reliance on *Quality House of Graphics, Inc. (Local One-L, Graphic Comm. Int'l Union)("Quality House"),* 336 NLRB 497 (2001), and related cases to support her finding is misplaced. *Quality House* imposes a duty to bargain over base pension contributions, not surcharge payments. *Id.* at 498-499. The surcharge payments were automatically assessed by the Pension Fund and, as detailed herein, it would be unreasonable to require Delta to bargain over its decision to discontinue the payments when it was not provided an opportunity to bargain over the implementation of the unlawful payments.

ALJ Anzalone's decision has the perverse effect of forcing Delta to violate Section 302(c)(5) of the LMRA by requiring the Company to retroactively contribute to the Pension Fund despite the absence of a written agreement to do so. Such an order is in direct conflict with the express language of Section 302(c)(5) of the LMRA.

Lastly, even assuming, *arguendo*, Respondent violated Section 8(a)(5) by unilaterally discontinuing its surcharge payments to the Pension Fund, Delta and the Union were at an

[1]References to ALJ Anzalone's decision will be referred to as "ALJD_____ ." References to the transcript of the hearing will be referred to as "Tr. ___ ." References to the General Counsel's exhibits will be referred to as "GC Ex. ." References to Delta's exhibits will be referred to as "Er. Ex.

impasse in May 2016 on a successor collective-bargaining agreement and as a result, liability cannot extend beyond this date. The presence of an unfair labor practice charge does not preclude the finding of an impasse.

For these and other reasons set forth below, ALJ Anzalone's decision should be reversed.

II. STATEMENT OF THE CASE AND FACTS

A. Procedural History and ALJ Anzalone's Decision

The Union filed its charge on May 16, 2016, and the Regional Director for Region 20 issued an order consolidating cases, consolidated complaint and notice of hearing on October 27, 2016, in which it alleged Delta violated Sections 8(a)(1) and (5) of the Act by failing and refusing to execute a written agreement with the Union ("*Heinz* Violation"), as well as by unilaterally decreasing the amount of its pension fund contributions.

On September 15, 2017, ALJ Anzalone issued her decision in which she concluded that Delta violated Sections 8(a)(1) and (5) by not providing notice to the Union before it discontinued making surcharge payments to the Pension Fund. (ALJD 10:15-11:6).[2] To support her decision, ALJ Anzalone mistakenly relied on *Quality House, supra,* and *BASF Wyandotte Corp.,* 274 NLRB 978 (1985), *enfd.* 798 F.2d 849 (5th Cir. 1986). *Quality House* and *BASF* are distinguishable from the instant action. Both *Quality House* and *BASF* discuss an employer's duty to bargain before discontinuing its base pension contributions, not its surcharge payments.

Further, completely absent from the record is a written agreement, as required by Section 302(c)(5) of the LMRA, permitting an increase in contributions to the Pension Fund. ALJ

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[2] Delta does not take exception with ALJ Anzalone's finding on the *Heinz* Violation. ALJ Anzalone correctly determined that no "meeting of the minds" occurred on this agreement and dismissed this portion of the General Counsel's complaint. (ALJD 9:13-15). Delta does, however, take exception with ALJ Anzalone's factual determination that Robert Sanders, Jr's testimony that "[Bobby Sanders] was concerned about rising labor costs" does not indicate that an agreement was not reached on the new collective-bargaining agreement. Such a statement shows Bobby's desire to negotiate more favorable labor rates for Delta in the new collective-bargaining agreement, and since those rates were never achieved, the testimony further supports Delta's position that Bobby never agreed to the unsigned collective-bargaining agreement.

Additionally, to the extent ALJ Anzalone finds the following statement made by Jose Santana about the 2015-2018 collective-bargaining agreement to be credible, Delta takes exception: "[according to Santana, he did direct Local 1176's administrative assistant to prepare a 2015-2018 collective-bargaining agreement for Delta in late March." Such a statement is self-serving and completely at odds with the fact that Santana never provided Delta with a copy of the agreement, even though the agreement was allegedly ready for Delta to sign. (Tr. 57:11-12; 59:9-13).

Anzalone pointed to no such agreement in her decision. Instead, ALJ Anzalone's decision rests completely on an incorrect reading of the Expired Agreement and a misinterpretation of the law.

B. Background

Delta and the Union have been parties to several collective-bargaining agreements throughout the years. (Tr. 22:3-15). The most recent agreement expired in August 2015, and Delta adhered to its terms ever since ("Expired Agreement"). (Er. Ex. 1). The Expired Agreement includes a base contribution rate of $1.95, but does not permit an increase in pension contributions. (Er. Ex. 1). Delta has continuously fulfilled its obligation by making base contribution payments to the Pension Fund. (ALJD 10:21-23).

On April 1, 2008, the Pension Fund was designated as underfunded and placed in "critical status." (Tr. 141:4-5). Thereafter, the Pension Fund sent Rehabilitation Plan notices to Delta, which demanded that Delta begin making surcharge payments. (GC Ex. 17).[3] Delta made the surcharge payments to the Pension Fund, in addition to the $1.95 base rate, until March 2016. (Tr. 159:11-160:7). Delta did not bargain with the Union over the implementation of the surcharge payments. (Tr. 224:13-20). Delta made the surcharge payments because of a mistaken belief it was required to, not because it agreed to. (Tr. 252:8-17). Joyce Sanders, Delta's Secretary, increased contributions each year "because the Pension Fund told Delta to." *Id.* She is not a lawyer, she did not realize increases were unlawful and she did not consult with an attorney on the subject until March 2016. (Tr. 252:23-253:5). Ms. Sanders made the payments notwithstanding the absence of a written agreement to do so.

[3] Under the Pension Protection Act of 2006, the Board of Trustees of a multi-employer pension plan are required to adopt a "Rehabilitation Plan" after the plan is deemed to be in "critical status" (less than 65% funded). 29 U.S.C § 1085. When a pension plan is in "critical status," contributing employers pay a "surcharge" along with their base contributions to help correct the plan's financial situation. *Bd. of Trs. of IBT Local 863 Pension Fund ("Local 863 ") v. C&S Wholesale Grocers, Inc.*, 5 F.Supp.3d 707, 711 (D.N.J March 19, 2014). The "surcharge" is assessed automatically by the pension fund. *Id.*

III. LEGAL ARGUMENT

A. ALJ Anzalone's Decision Forces Delta to Violate Federal Law.

The Expired Contract does not require that Delta make surcharge payments in addition to the $1.95 hourly base rate. There is no written agreement with that requirement.

Section 302(c)(5) of the LMRA authorizes employer-payments to trust funds that are "established...for the sole and exclusive benefit of employees and their families, and dependents" and that pay either from principal, income, or both, for the benefit of employees, provided that:

> (1) a written agreement with the employer specifies the detailed basis on which payments are to be made; (2) the employer and employees are represented equally in the trust's administration; (3) the trust agreement provides for arbitration of deadlocks (if the parties have not previously selected a neutral person to break deadlocks); and (4) the trust agreement provides for an annual audit of the trust fund and makes the results available for inspection by interested persons. (emphasis added).

ALJ Anzalone points to Articles 18.1 and 18.4 of the Expired Contract to support her conclusion that Delta was required to make surplus contributions to the Pension Fund. (ALJD 10:16-20).

Noticeably absent from Article 18.1 and 18.4 is a "detailed basis" for higher pension contribution rates, as required by Section 302(c)(5) of the LMRA.

Article 18.1 simply permits an increase to wage rates. The "Notes to Schedule A" section provides, in part: "The Schedule 'A' rates are minimums only." (Er. Ex. 1, p. 34). The reference to "rates" in this language refers to wage rates, not pension rates.[4]

Article 18.4 states: "It is the joint responsibility of the Employer and the Unions, signatory to this Agreement, to instruct the Trustees of the applicable Pension Plans to take appropriate action to eliminate any unfunded liability that currently exists or unfunded liability

[4] The "Notes to Schedule A" is informed by language elsewhere in the Expired Agreement. At Article 19.2, the collective-bargaining agreement states: "The wage rates established within Schedule 'A' of this Agreement are minimum rates only, and shall not prohibit the Employer from paying a premium wage rate to any of its Employees." (Er. Ex. 1, p. 15). The reference to "wage rates" appears again in Schedule "A" of the Supplemental Agreement. Er. Ex. 1 - Supplemental Agreement, p. 6). Schedule "A" of the Supplemental Agreement states: The wage rates that are effective 8/1/07 are minimum wage rates only.

that develops during the term of this Agreement as soon as practical." Noticeably absent from this provision is any specificity as to what constitutes an "appropriate action" by the Trustees or how unfunded liability should be determined. Such vague language allows the Trustees to choose from an unquantifiable number of options and cannot reasonably be interpreted to comply with Section 302(c)(5) of the LMRA.

In *Guthart v. White,* 263 F.3d 1099 (9th Cir. 2001), the Ninth Circuit held that to comply with Section 302(c)(5) of the LMRA, references to contribution rates in a collective-bargaining agreement or trust agreement must provide a "detailed basis" under which the payments are to be made. *Id.* at 1103. If an agreement is devoid of language specifying in detail how payments are to be made, such an agreement cannot support pension contributions made by an employer. *Id.* at 1104. By like reasoning, an agreement devoid of language specifying the circumstances for a unilateral increase to pension contribution rates can not comply with Section 302(c)(5) of the LMRA.

Here, ALJ Anzalone completely ignores the requirements of the LMRA. There is simply no document in the record that provides specific or detailed language justifying an increase in pension contributions. As noted, the phrase "the Schedule 'A' rates are minimums only" in Article 18.1 means that Schedule "A" simply defines the base wage rate, which may be subject to increase (because of Holiday pay or employer discretionary premium rates, for example). Perhaps even more importantly, "Notes to Schedule A" in Article 18.1 does not provide any basis, let alone a "detailed basis" for delineating how much rate contributions can be increased or under what circumstances. Lastly, Article 18.4 provides no more than that the parties are to "instruct Trustees of the applicable Pension Plans to take appropriate action to eliminate any unfunded liability." Article 18.4 does not provide the circumstances under which the pension rates can be unilaterally increased nor the method for calculating such rates. (Er. Ex. 1, p. 14).

Therefore, as in *Guthart, supra,* the Expired Agreement is an agreement without a "detailed basis" for pension rate contributions, and it does not comply with the requirements of Section 302(c)(5) of the LMRA. Even if ambiguous (which it is not), the language in the Expired

Agreement cannot be contrived to require an unlawful act. Simply put, the Board should not permit ALJ Anzalone to turn an unlawful subject (e.g., violating Section 302(c)(5)) into a mandatory subject of bargaining. *See Quality House,* 336 NLRB at 499 (Chairman Hurtgen, dissenting).

B. Delta Did Not Have a Duty to Bargain Over Pension Surcharges.

1. Pension Surcharges Are Not a Mandatory Subject of Bargaining Because they Do Not "Vitally Affect" the Terms and Conditions of Employment As Required by Sections 8(a)(1) and (5).

ALJ Anzalone conflates Delta's bargaining obligations under the Act. Sections 8(a)(1) and (5) did not require Delta to bargain with the Union before it discontinued making surcharge payments to the Pension Fund. A duty to bargain arises only when an employer's contemplated change "vitally affects" the terms and conditions of employment (e.g., rates of pay, wages, and hours of employment). *Allied Chem. & Alkali Workers v. Pittsburgh Plate Glass Co.,* 404 U.S. 157, 179 (1971). While the Board has established that an employer's base pension contributions under a collective-bargaining agreement "vitally affect" the terms and conditions of employment, it has yet to make the same determination for pension surcharge payments. The cases relied on by ALJ Anzalone are not instructive on this issue. (ALJD 9:29-37). For example, in *Peerless Roofing Co. v. NLRB*, 641 F.2d 734 (9th Cir. 1981), the Court upheld the Board's finding that the employer violated Section 8(a)(5) by not providing advance notice to the union before terminating its base pension payment to the trust fund. *Id.* at 736. A similar finding was reached in *Southwestern Steel & Supply, Inc. v. NLRB,* 806 F.2d 1111 (D.C. Cir. 1986) and does not support ALJ Anzalone's position. In *Southwestern Steel*, the employer's duty to bargain over the pension contributions was triggered as a result of the court's finding that the provision requiring such contributions survived the expiration of the collective-bargaining agreement. *Id.* at 1112- 13. To wit, the employer was required to maintain the status quo and was precluded from unilaterally changing the base pension rate included in the parties' expired collective-bargaining agreement.

Noticeably absent from ALJ Anzalone's decision is authority supporting her finding that

an employer is obligated to bargain over pension surcharge payments after the expiration of a collective-bargaining agreement. The explanation is simple: no such obligation exists under the Act. Pension surcharge payments are designed to help the plan emerge from its "critical status," i.e., the payments benefit the funding of the plan, not the unit employees. *Local 863*, 5 F. Supp. 3d at 711.

Here, Delta has at all times contributed to the Pension Fund at the base rate of $1.95. (Tr. 258:24-259:1). This rate was memorialized in the 2007-2008 wage schedule, which is incorporated by reference in the Expired Agreement (Er. Ex. 1, p. 14; Er. Ex. 2). Delta never agreed to a higher rate. (Tr. 224:16-20). ALJ Anzalone does not dispute this. (ALJD 3:17-19). The pension surcharges were never included in the Expired Agreement and were only paid by Delta because of a mistaken belief it was required to, not because it agreed to. (Tr. 252:8-17). Board precedent only requires Delta to maintain the status quo of the Expired Agreement, no such duty exists with respect to the pension surcharges. *See e.g., Buck Brown Contracting*, 272 NLRB No. 145 (1984); *Cuyamaca Meats v. Pension Trust Fund,* 827 F.2d 491, 496 (9th Cir. 1987).

Delta's only obligation under Sections 8(a)(1) and (5) is to bargain over matters that "vitally affect" the terms and conditions of its employees, i.e., base pension contributions. Surcharge payments do not trigger such an obligation.

2. The Pension Surcharges Were Assessed Automatically and Not Bargained For By the Parties.

Delta was never provided an opportunity to bargain over the pension surcharge payment when it was established in 2008 and, as result it cannot be forced to bargain over its decision to discontinue such payments. As discussed above, pension surcharges are assessed automatically. *Local 863*, 5 F.Supp.3d at 711. The surcharge payments are based on a Rehabilitation Plan established by the Pension Fund, not by the Union, and not by Delta's collective-bargaining agreement with the Union. 29 U.S.C. § 1085(e)(7); *Local 863*, 5 F.Supp.3d at 721(an automatic surcharge arises not under a collective-bargaining agreement, but under ERISA section 305(e)(7); the value of the automatic employer surcharge is informed by the employer's collective

bargaining agreement - it does not "magically amend the terms of the agreement").

Here, ALJ Anzalone mistakenly combines the base contribution rate included in the Expired Agreement with the surcharge rate established by the Pension Fund. (ALJD 3:24-29). The surcharge rate is a rate separate and distinct from the Parties' collective-bargaining agreement. *Local 863*, 5 F.Supp.3d at 722. The Union played no part in determining the amount of the surcharge rate or the schedule established to collect the payments. (Tr. 140:15-141:16).

C. ALJ Anzalone Erred In Failing To Determine the Parties Were At An Impasse in May 2016.

ALJ Anzalone's factual findings clearly establish the Parties were at an impasse in May 2016, right before Delta's former President, Bobby Sanders ("Bobby"), passed away.[5] As discussed below, Delta is not liable for any delinquent pension contributions past this date. Additionally, a violation of Section 8(a)(5) - which Respondent makes no concessions in this regard - does not negate the finding that a lawful impasse existed. Courts and the Board have repeatedly rejected any presumption that an employer's unfair labor practice automatically precludes the possibility of meaningful negotiations or good faith impasse. *See, e.g., Wilshire Plaza (Majestic Towers)*, 353 NLRB No. 29 (2008) ("it is well established that 'not all unremedied unfair labor practices committed before or during negotiations [...] will lead to the conclusion that impasse was declared improperly.'") (citing *Dynatron/Bondo Corp.*, 333 NLRB 750 (2001)); *Storer Communications*, 297 NLRB 296 (1989) (where the company has already bargained over those same changes in good faith, rescission of prior unilateral changes is not required; "there is no absolute rule precluding a finding that the parties have subsequently bargained in good faith over the change."); *Dependable Bldg. Maintenance Co.,* 274 NLRB 216, 219 (1985) (good faith bargaining to a subsequent impasse is still possible without a restoration of the status quo ante); *NLRB v. Cauthorne*, 691 F.2d 1023 (D.C. Cir. 1982) (finding that good- faith bargaining could still take place despite the company's unrescinded unilateral changes).

In *Cauthorne*, the employer and union were parties to a collective-bargaining agreement

[5] In addition to being the President of Delta, Bobby Sanders handled all negotiations with the Union.

in which the employer was required to contribute to a trust fund on behalf of unit employees. 691 F.2d at 1024. Before the expiration of the initial agreement, the parties met to negotiate a successor agreement. *Id.* After several unsuccessful meetings, the employer unilaterally terminated its trust fund contributions. *Id.* Shortly thereafter, the union filed an unfair labor practice charge contending the employer violated Section 8(a)(5) of the Act by discontinuing its trust fund contributions. *Id.* at 1025. The Board issued a make-whole order, in which the employer was required to contribute to the fund until the parties reached an agreement or impasse. *Id.* In reversing the Board's order, the D.C. Circuit Court determined that the Board should have considered whether the employer's liability terminated when the negotiations' futility was clear. *Id.* The Court held that where an employer and a union have bargained in good faith, despite the employer's prior unilateral changes in wages or conditions of employment, the employer's ongoing liability for the unlawful unilateral change terminates on the date when the parties execute a new agreement or reach a lawful impasse. *Id.* at 1026. (emphasis added). The Court rejected any presumption that an employer's unfair labor practice automatically precludes the possibility of meaningful negotiations and prevents the parties from reaching a good-faith impasse. *Id.* at 1025.

Here, ALJ Anzalone properly held that no agreement had been reached at the time of Bobby's death on a successor collective-bargaining agreement, including the pension contribution rate. (ALJD 9:13-15). However, she completely ignores a corollary finding that the Parties were at an impasse on the pension contribution rate during their last meeting in May 2016. Even assuming, *arguendo*, Delta violated Section 8(a)(5) by unilaterally discontinuing the surcharge payments to the Pension Fund, it cannot be liable for any pension contributions after Bobby's death in May 2016. *See, e.g., Cauthorne*, 691 F.2d at 1025.

ALJ Anzalone's factual findings support the conclusion that the Parties were at an impasse.[6] In June 2015, Bobby initiated negotiations over a successor collective-bargaining

[6] By referencing ALJ Anzalone's factual determinations, Respondent does not concede any exceptions referenced herein or included in Respondent Delta Sandblasting Company, Inc.'s Exceptions to the Decision of Administrative Law Judge Mara-Louise Anzalone filed concurrently with this brief.

agreement with the Union. (ALJD 3:41-43). Bobby and Union Representative, Jose Santana ("Santana") discussed a new collective-bargaining agreement in August 2015, October 2015, January 2016, and February 2016; however, on each occasion, the Parties failed to reach an agreement on any of its terms. (ALJD 4:5-22). In May 2016, while Bobby was fishing with friends in Mexico, Santana called Bobby to discuss the pension contribution rate, but again, Bobby denounced an agreement had been reached. (ALJD 9:8-11).[7] Shortly after this conversation, Bobby passed away. (ALJD 2:27-28). As supported by *Cauthorne*, *supra*, the unsuccessful negotiations between Bobby and Santana over a successor collective-bargaining agreement evidences the Parties were at an impasse. As a result, even if Delta did violate Section 8(a)(5) by unilaterally discontinuing the pension surcharge payments, any resulting liability terminated in May 2016.

IV. CONCLUSION

For the foregoing reasons and based on the record evidence, Delta respectfully requests the Board to reject the portions of ALJ Anzalone's decision excepted to by the Company. As explained above, it must be found that Delta did not violate Sections 8(a)(1) and (5) of the Act by not notifying the Union in advance of its decision to discontinue making surcharge payments to the Pension Fund.

Dated: November 7, 2017

LITTLER MENDELSON
A Professional Corporation

By: _____
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[7] Ms. Sanders notified the pension fund in April 2016 via a letter that it was discontinuing its pension contributions. The Pension Fund immediately notified the Union. (Tr. 61:4-62:2). ALJ Anzalone completely ignores the fact that Ms. Sanders' April 2016 letter was an express notice to the Union that Delta desired to bargain over the pension contribution rate. The record evidence clearly supports this conclusion as indicated by the fact that Santana and Bobby began their negotiations over the pension contribution rate in May 2016, a month after the letter was received. *Id.*